# STATE OF MICHIGAN

# COURT OF APPEALS

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BRIAN KILLINGBECK,

Plaintiff-Appellant,

v

FLOTATION DOCKING, INC.,

Defendant-Appellee.

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UNPUBLISHED
May 26, 2005

No. 251928
Mackinac Circuit Court
LC No. 99-004913-NZ

Before: Murray, P.J. and O'Connell and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition for defendant pursuant to MCR 2.116(C)(10) in this worker's compensation retaliation case. Because plaintiff presented "direct evidence" of discrimination, defendant's assertion of a nondiscriminatory reason was insufficient to avoid trial. We reverse.

Plaintiff argues that the trial court erroneously granted defendant's motion for summary disposition because it failed to consider the evidence in the light most favorable to him and erred by requiring him to rebut defendant's nondiscriminatory reason for the adverse employment decision when he presented direct evidence of discriminatory animus. We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). A motion under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the nonmoving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31.

MCL 418.301(11) prohibits employers from discriminating against employees who exercise their rights under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. MCL 418.301(11) provides:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by

> the employee on behalf of himself or herself or others of a right afforded by this act.

In *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999), this Court stated that to establish a violation of this provision, a plaintiff must show that: "(1) he asserted his right for worker's compensation, (2) defendant laid off or failed to recall plaintiff, (3) defendant's stated reason for its actions was a pretext, and (4) defendant's true reasons for its actions were in retaliation for plaintiff's having filed a worker's compensation claim." Further, the plaintiff bears the burden of showing that a causal connection existed between the protected activity, i.e., the filing of a worker's compensation claim, and the adverse employment action. *Id*.

*Chiles, supra*, involved circumstantial or indirect evidence of discrimination. See *Chiles, supra*, 238 Mich App at 470-471. In such cases, a plaintiff must proceed under the burden-shifting approach articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133-134; 666 NW2d 186 (2003); *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Under this approach, the plaintiff must present a rebuttable prima facie case based on proofs from which a factfinder can *infer* that the plaintiff was subjected to unlawful discrimination. *Sniecinski, supra* at 134. "Once a plaintiff has presented a prima facie case of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Id*.; *Hazle, supra* at 464. If the defendant presents evidence to rebut the presumption, "the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination." *Sniecinski, supra* at 134.

Plaintiff argues that the *McDonnell Douglas* burden-shifting approach does not apply in this case because he produced direct evidence of discriminatory animus. The burden-shifting approach of *McDonnell Douglas* does not apply when a plaintiff presents direct evidence of unlawful discrimination. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001); *Harrison v Olde Financial Corp*, 225 Mich App 601, 609; 572 NW2d 679 (1997). "Direct evidence" is "'evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Hazel, supra* at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999); see also *Harrison, supra* at 610. In *Sniecinski, supra* at 133, the Michigan Supreme Court stated:

> In a direct evidence case involving mixed motives, i.e., where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a "substantial" or "motivating" factor in the decision. In addition, a plaintiff must establish her qualification or other eligibility for the position sought and present direct proof that the discriminatory animus was causally related to the adverse decision. Stated another way, a defendant may avoid a finding of liability by proving that it would have made the same decision even if the impermissible consideration had not played a role in the decision. [Citations and footnote omitted.]

Once a plaintiff presents evidence of his qualification or eligibility and direct proof that the discriminatory animus was causally related to the adverse employment action, an employer may not avoid trial by merely articulating a nondiscriminatory reason for the decision. *Harrison, supra* at 613. Rather, "[u]nder such circumstances, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true."[1] *Id.*

Plaintiff relies on statements allegedly made by his supervisor, Jeffrey Cason, regarding a September 1, 1999, termination letter and the motivation for sending the letter. He argues that these statements constitute direct evidence of discrimination. Defendant argues that Cason's alleged statements are inadmissible "stray remarks" that do not constitute direct evidence of discriminatory animus. Defendant also argues that plaintiff failed to show that his worker's compensation claim was causally connected to his termination.

We conclude that Cason's alleged remarks constitute "direct evidence" of discrimination. The remarks are similar to the comment at issue in *DeBrow, supra*, in that they were made in connection with plaintiff's termination. In *DeBrow*, the plaintiff's superior fired him and, in the same conversation, told him that he was "getting too old for this shit." *DeBrow, supra* at 538. Our Supreme Court reversed this Court's decision in part and adopted Justice Young's partial dissent in this Court, stating:

> Plaintiff testified in his deposition that when he was being removed as president, his superior, Century 21's Great Lakes Executive Vice President, Robert Hutchinson, told plaintiff "you're too old for this shit." This statement is direct evidence of age animus. Moreover, because it was allegedly made in the context of the discussion in which plaintiff was informed that he was being removed as president, it bears directly on the intent with which his employer acted in choosing to demote him.
>
> The Court of Appeals majority ignores this evidence as unworthy of credibility. Neither this Court nor the trial court can make factual findings or weigh credibility in deciding a motion for summary disposition. This evidence cannot be ignored in the context of a motion for summary disposition and precludes, in my judgment, dismissal of the plaintiff's age claim. Clearly, the statement by Vice President Hutchinson, if believed by the trier of fact, suggests that plaintiff's age was *a factor* in the mind of his employer at the point plaintiff was removed from his position. [*Id.* at 540 (citations omitted).]

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[1] Although we are unaware of any Michigan precedent involving "direct evidence" of discrimination in the context of a retaliation claim under the WDCA, the rules pertaining to "direct evidence" and "indirect evidence" cases apply in this context by analogy. See *Chiles, supra* at 470 (extending principle applicable to an action under the Civil Rights Act, MCL 37.2101 *et seq.*, in *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997), to an action for retaliation under the WDCA "by analogy").

In response to the defendant's argument that the disputed remark was a "stray remark" that could not give rise to liability, the Court stated that "this is an argument for the finder of fact to consider." *Id*. at 541. Accordingly, the Court reversed this Court's decision affirming the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) in the defendant's favor on the plaintiff's age discrimination claim. *Id*. at 538-539, 541.

Like *DeBrow*, Cason's remarks in the instant case, if believed, show that illegal discriminatory animus was at least a motivating factor for the September 1, 1999, letter terminating plaintiff's employment. As in *DeBrow*, defendant's argument that the remarks are mere "stray remarks" is for the factfinder to determine. Defendant also argues, however, that the remarks are inadmissible and that, as such, plaintiff has failed to present admissible evidence establishing a genuine issue of material fact for trial.[2]

In determining whether alleged "stray remarks" are admissible, courts should examine the following factors: (1) whether the remarks were made by a decisionmaker or an agent of the employer within the scope of his employment and involved in the challenged decision, (2) whether the remarks were related to the decision-making process, (3) whether they were vague and ambiguous or reflective of discriminatory animus, (4) whether they were isolated or part of a pattern of biased remarks, and (5) whether the remarks were made close in time to the adverse employment action. *Sniecinski, supra* at 136 n 8; *Krohn v Sedgwick James of Michigan, Inc,* 244 Mich App 289, 292; 624 NW2d 212 (2001).

In *Krohn,* the defendant employer hired the plaintiff as an executive secretary in 1981 and ultimately terminated her employment in 1996, when she was fifty-seven years of age. *Krohn, supra* at 292-293. She thereafter filed an age discrimination claim against her employer, who moved in limine to exclude from evidence at trial a remark made by one of her previous supervisors, Michael Rastigue. *Id*. at 293. Apparently, Rastigue stated, "out with the old and in with the new" in reference to his hiring of a new group of employees from a competing firm. *Id*. Two years later, in 1995, one of those employees, Mark Miller, took over Rastigue's job and became the plaintiff's supervisor. *Id*. The following year, Miller terminated the plaintiff's employment as part of a downsizing effort. *Id*. The trial court granted the employer's motion in limine and excluded Rastigue's comment from evidence at trial. *Id*. at 293-294. This Court considered the factors outlined above in determining the admissibility of the alleged "stray remark" and concluded that the trial court properly excluded the evidence. *Id*. at 300-302. This Court reasoned that Rastigue was not the plaintiff's supervisor when she was terminated and that the remark could not be attributed to her employer because it was not made by a person involved in the decision to terminate her employment. *Id*. at 300-301. Rastigue did not make the comment in reference to the plaintiff but in reference to other, recently hired employees, and that the remark was both isolated and remote in time, given that it was made more than two years before the plaintiff's termination. *Id*. at 301. The remark was ambiguous and age-neutral

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[2] MCR 2.116(G)(5) states that affidavits, depositions, admissions, and documentary evidence offered in opposition to a motion for summary disposition pursuant to MCR 2.116(C)(10) shall only be considered to the extent that their content or substance would be admissible as evidence to deny the grounds averred in the motion.

because no evidence suggested that older employees were terminated and replaced with younger employees at the time that Rastigue made the comment. *Id*. at 301-302. Thus, this Court held that the comment was irrelevant. *Id*. at 302.

The *Krohn* Court further stated, however, that if proffered evidence is determined to be relevant to an employer's motivation, courts must balance the probative value of the comment against the risk of unfair prejudice. *Krohn, supra* at 302-303; MRE 403. This Court stated that had it determined that the remark had some minimal relevance, the risk of unfair prejudice would have substantially outweighed its probative value. *Id*. at 303. This Court opined that "[b]ecause the ambiguous and isolated remark had nothing to do with the termination of plaintiff's employment and was made by a former supervisor remote in time from when plaintiff's employment was terminated, its admission would have served only to inflame, mislead, or confuse the jury." *Id*.

Examining the factors articulated above, Cason's alleged "stray remarks" were not inadmissible as defendant contends. *Sniecinski, supra* at 136 n 8; *Krohn, supra* at 292. Defendant's agent made the remarks within the scope of his employment and while involved in the adverse employment decision. Although Dan Carmichael, defendant's owner and president, testified that Cason had a "very light degree" of involvement in the decision to tell plaintiff that there was not going to be a position available for him when he was ready to come back to work, Carmichael admitted he discussed the employment situation with Cason and thereafter decided to give plaintiff a "heads-up" and suggest that he seek alternative employment. Cason testified that he discussed plaintiff's absence with Carmichael, including the fact that a position would not be available for plaintiff when he was ready to return to work. From the deposition testimony of both Cason and Carmichael, Cason was involved to some degree in the adverse employment decision, and Cason's alleged remarks were directly related to the decision-making process. If believed, the comments evidenced that plaintiff's worker's compensation claim was at least part of the reason why Carmichael sent plaintiff the letter informing him that no job would be available when plaintiff was ready to return to work.

Defendant contends that the remarks were ambiguous because plaintiff's reference to "it" in his deposition testimony was unclear. When read in context, however, it is clear that plaintiff's references to "it" referred to the letter terminating plaintiff's employment. Further, if believed, the comments reflected discriminatory animus. Although the isolated comments did not constitute a pattern of biased remarks, plaintiff did not allege a pattern of discriminatory conduct on behalf of defendant. Rather, the conduct that plaintiff alleges constituted wrongful discrimination involved the September 1, 1999, termination letter and Cason's remarks regarding the motivation for sending the letter. Finally, the remarks were made close in time to the adverse employment action. Defendant's argument that the remarks were made months before plaintiff was released to return to work is inapposite. The adverse employment action in this case occurred when Carmichael sent plaintiff the letter terminating plaintiff's employment. It is undisputed that Cason made the remarks just a few days before Carmichael sent the letter. Thus, they were made close in time to the adverse employment action.

The remarks were not substantially more prejudicial than probative. If believed, the remarks show that unlawful discrimination played a role in the decision to terminate plaintiff's employment. The remarks were directly related to the employment decision and were not made by someone outside the decision-making process. Thus, the remarks were probative and would

not merely inflame, mislead, or prejudice a jury. Accordingly, the remarks constitute evidence that would be admissible at trial. *Krohn, supra* at 292.

In a "direct evidence" case, a plaintiff must also "present direct proof that the discriminatory animus was causally related to the adverse decision." *Sniecinski, supra* at 133. In *Sniecinski,* the plaintiff alleged that the defendant discriminated against her because her previous pregnancies forced her to take time off work. *Id*. at 126-130. The plaintiff relied on several statements allegedly made by a former supervisor, Michael Curdy, regarding her pregnancies, including Curdy's statement that he "would never hire anyone in child-bearing years again." *Id*. at 135. The Supreme Court stated that it did not need to determine whether Curdy's remarks were mere "stray remarks" or direct evidence of illegal discrimination because the plaintiff failed to show that the remarks were causally related to the defendant's failure to hire her. *Id*. at 136. The defendant presented evidence showing that if the plaintiff began collecting long-term disability benefits, under her employer's long-term disability policy, she would be "separated" from the company and issued a final pay check. *Id*. at 129. Defendant also presented evidence that if the plaintiff was "separated" from the company, her transfer to the defendant, her employer's parent company, would not be "possible." *Id*. at 126, 139-140. Thus, the Court held that the plaintiff failed to establish a causal nexus between her pregnancy and the defendant's failure to hire her. *Id*. at 140.

Unlike *Sniecinski*, plaintiff satisfied the causation requirement. In fact, Cason's alleged remarks were directly related to causation. If believed, the remarks constitute direct proof that plaintiff's worker's compensation claim was causally related to the adverse employment decision. As such, defendant could not avoid a trial by merely articulating a nondiscriminatory reason for the decision, and the case must be submitted to the factfinder to determine whether plaintiff's claims are true. *Harrison, supra* at 613. The trial court erred by requiring plaintiff to rebut defendant's asserted nondiscriminatory reason stated in the September 1, 1999, letter. Because plaintiff presented "direct evidence" of discrimination, defendant's assertion of a nondiscriminatory reason was insufficient to avoid trial. *Id.* By persuading the factfinder that it would have made the same decision even if the impermissible consideration was not a "determining factor" in the employment decision is defendant's method for avoidance of liability. *Sniecinski, supra* at 133; *Harrison, supra* at 613. The trial court also erred by weighing the evidence and determining that the September 1, 1999, letter "appears to be a heads up letter based on the available work . . . ." Whether the letter was motivated at least in part by plaintiff's worker's compensation claim should be determined by the factfinder. *DeBrow, supra* at 540-541.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio